No. 83-1721

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The opposing briefs filed by respondents rest upon a simple, but faulty, syllogism. The basic premises are, first, that the State committed a constitutional violation by requiring segregated schools in St. Louis until 1954 and, second, that the St. Louis schools currently have a high ratio of black to white students and are in need of new programs and school buildings. Thus, conclude respondents, the federal courts can order the State to fund a multi-district busing plan to achieve greater racial balance than the St. Louis school district affords, guarantee the City "AAA-rated" schools, and share equally any building programs chosen by the St. Louis school board. Significantly, respondents reach this conclusion even though neither court below made any inquiry into whether, much less findings that, the racial mix in the district as a whole or any substandard conditions have been caused by the constitutional violation.

This position, quite apart from its dependence on abstraction, has several flaws. First, respondents are simply wrong when they say that *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (*Dayton I*), does not require findings of causation (or "incremental effect") in this case and wrong again when they question the basic equitable principles set forth in *Milliken v. Bradley*, 433 U.S. 263 (1977) (*Milliken II*). The decisions in *Dayton* I and *Milliken* II plainly establish that equitable relief, if it is to be remedial rather than punitive, must rest upon findings that distinguish conditions caused by constitutional violations from conditions that would have existed anyway. See pages 3-5, *infra*. Second, nothing in the Constitution requires the State to pay for interdistrict busing, even with the consent of the districts involved, to remedy the fact that a fully integrated school system in St. Louis will nonetheless be 80 per cent black. The plaintiffs have no right to any set proportion of black and white students in their home school district, *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken* I), and nothing in the case demonstrates that the population of the district as a whole was affected by unlawful state action. See pages 5-7, *infra*. Similarly, plaintiffs have no right to "AAA-rated" schools or new school buildings, conditions which are absent from many school systems throughout Missouri and, indeed, the entire Nation. See pages 7-8, *infra*.[1] The imposition of this costly order, based on little more than the wishes of the other parties, has thus "worked a serious injustice against the State." Brief for the United States at 19.[2]

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[1] We also address respondents' contention that the Court has passed on these issues on earlier petitions for certiorari. See pages 8-10, *infra*.

[2] Respondents seek to deflate the cost of the remedy by using figures from last year (when much of the plan was not in effect) and by excluding the costs of the interdistrict transfer plan and

1. Addressing our argument that *Dayton* I requires findings of causation in this case, respondents (like the court of appeals) take the position that "the holding in *Dayton* I is limited to situations where 'only a few apparently isolated discriminatory practices have been found.'" Respondents' Brief at 23. That contention is a misreading of *Dayton* I.

The decision in *Dayton* I, far from being a narrow exception to normal equitable principles, is essentially a recognition that those principles, to be meaningful, must rest upon proper findings. The Court in *Dayton* I reviewed the applicable case law in detail, emphasizing the basic doctrine that, even after a constitutional violation has been identified, " a federal court is required to tailor 'the scope of the remedy' to 'fit the nature and extent of the constitutional violation.'" *Id.* at 420, quoting *Milliken* I, *supra*, 418 U.S. at 744; see also *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The Court then went on to point out, however, that the extent of any violation necessarily depends upon findings about its "incremental effect," *i.e.*, the difference between the situation as it is and as "it would have been in the absence of such constitutional violations." 433 U.S. at 420. The requirement of a fit between the violation and the remedy, in turn, means that "[t]he remedy must be designed to redress that difference * * *." *Ibid.* See *Berry v. School District of City of Benton Harbor*, 698 F.2d 813, 819 (6th Cir. 1983).

Although respondents suggest that the Court somehow backed away from these principles in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), Respondents' Br. at 23, that suggestion is unpersuasive. First of all, the importance of proper findings was, if anything, un-

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the capital improvement plan, two of the three major components. Respondents' Br. at 13-14 & n.14. We note that the estimate of State costs in fiscal 1985 alone is in the range of $50 million—not including $63.5 million sought from the State for capital improvements.

derscored by the decision in *Columbus*, where the Court distinguished *Dayton* I on the basis of findings that the *Columbus* defendants' "purposefully discriminatory policies had current, systemwide impact." The Court then stated flatly that such findings were "an essential predicate * * * for a systemwide remedy." 443 U.S. at 466 n.15. Taken in that light, of course, *Columbus* stands for precisely the proposition that we are advancing here: that a broad remedy must rest upon findings of equally broad continuing effects from the constitutional violation.[3] In any event, nothing in *Columbus* compels the illogical conclusion that the courts must identify the current impact of isolated violations, but not of widespread ones. It would seem self-evident that a remedy cannot be tailored to the effects of a violation unless a court first determines what those effects are.

Relying on an antitrust case, *Ford Motor Co. v. United States*, 405 U.S. 562 (1972), respondents also insist that "the courts are not limited * * * to a fanciful and futile effort to try to recreate 'things as they would have been.'" Respondents' Br. at 22. With this contention, however, they run afoul not only of *Dayton* I but of *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken* II). In *Milliken* II the Court stated unequivocally that an equitable decree "must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Id.* at 280, quoting *Milliken* I, *supra*, 418 U.S. at 746 (emphasis in original). See also *Oliver v. Kalamazoo Board of Education*, 706 F.2d 757 (6th Cir. 1983). While no one disputes that such an inquiry often may

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[3] In this case, by contrast, the court required the State to pay for an interdistrict busing plan involving more than 20 suburban districts even though there are no findings that the pre-1954 policy has anything more than an intradistrict impact. See also *Milliken* I, *supra*, 418 U.S. at 744-45.

involve difficult factual assessments, "that is what the Constitution and our cases call for, and that is what must be done * * *." *Dayton* I, *supra*, 433 U.S. at 420.[4]

2. The inequities caused by a lack of findings are fully evident in this case. For, although the absence of findings itself makes analysis more difficult, various observations by the court of appeals (and now by respondents) indicate that the remedy rests on a serious misapprehension either of the rights at issue or the scope of equitable powers.

a. *The Multidistrict Remedy.* While respondents contend that the busing provisions are required to eliminate "one race schools" within St. Louis, Respondents' Br. at 16, 20, that general statement obscures two carefully neglected facts: that 80 per cent of the district students are black and that an intradistrict plan has already integrated black and white students in St. Louis as much as possible. Yet, both facts are essential to an understanding of the busing order. For, despite respondents' current silence on the subject, the court of appeals made clear that it was approving the interdistrict busing order for "an intradistrict violation" because even a fully integrated St. Louis school district would have an 80/20 black-to-white student ratio and because white students might leave the system under such conditions. Pet. App. 32a. In our view, this insistence on more than a unitary school system exceeds the power of a federal court.[5]

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[4] The inquiry, while perhaps difficult, is hardly uncommon. Federal courts frequently have to determine whether current conditions result from governmental action or from other constitutionally neutral factors in order to determine whether particular patterns of student attendance are unconstitutional in the first place. See, e.g., *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

[5] Contrary to respondents' suggestion, Respondents' Br. at 19, we are not contesting the sole factual finding made regarding state liability, i.e., that the separation of students *within* St. Louis in 1980 was a vestige of the pre-1954 policy. Rather, we are saying that such a finding supports an intradistrict order to assure a

Although it would be hard to tell from respondents' briefs, this Court has made clear that the right at issue here is not a right to attend schools with a desired degree of integration but to attend a unitary school system in the plaintiffs' own district. *Milliken* I, *supra*, 418 U.S. at 746. Since the remedy for unlawful segregation is to restore this right, the Court has also said that the obligation of a defendant state or school board, having once maintained a dual program, is to "effectuate a transition to a racially nondiscriminatory school system." *Columbus Board of Education v. Penick*, *supra*, 443 U.S. at 458. Given these well-established principles, we disagree with the court of appeals that, once an intradistrict plan had been imposed to achieve a "racially nondiscriminatory school system," the district court had further power to go outside the system on the ground that more integration than is afforded by the City school population could be achieved by incorporating suburban schools. Even though some unitary school systems will have a high percentage of white students and others (like St. Louis) a high percentage of black students, and such systems may even exist side by side, this Court has never taken the position that the States, as a constitutional duty, must combine such systems or finance transfers among systems to offset disparities in population. There is a marked difference between eliminating discrimination root and branch, *Green v. County School Board*, 391 U.S. 430, 438 (1968), and endorsing, directly or indirectly, a "substantive constitutional right [to a] particular degree of racial balance or mixing." *Milliken* II, *supra*, 433 U.S. at 280 n.14.

Notwithstanding these principles, respondents read *Hills v. Gautreaux*, 425 U.S. 284 (1976), to hold that a court may disregard district lines to remedy prior segregation. Respondents' Br. at 18. But, whatever merit

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unitary school system but not an interdistrict order to achieve greater racial balance than the unitary system will afford.

that reading might have in a different case, it misses an essential distinction between this case and *Hills*. In *Hills*, the Court regarded the Chicago metropolitan area as the relevant geographical area for housing because it was plain that, in the absence of a violation, the plaintiffs would have had access to housing throughout that area. *Id.* at 299-300. In this case, however, the relevant geographical area for St. Louis students is limited to the City itself because, even in the absence of a violation, they still would have gone only to City schools. Thus, while *Hills* stands for the proposition that courts need not always stop at boundary lines in their efforts to restore plaintiffs to the position they otherwise would have occupied, it does not mean that they may put plaintiffs, at state expense, in positions they would *not* have occupied, solely to achieve a racial mix unavailable in the district where they live. Indeed, *Milliken* II emphasized the basic limits on equitable power in the Term after *Hills* was decided. See page 4, *supra*.

b. *The Quality Education and Rebuilding Programs.* The court of appeals, in approving much of the quality education and rebuilding programs, indicated its view that schools should have "AAA status" and "a constitutionally acceptable level" of facilities. It says much about the merits of these standards that respondents not only do not defend them, they do not even mention them. Instead, they rest on vague assertions that these "compensatory programs" are necessary to eradicate the "vestiges" of segregation. E.g., Respondents' Br. at 20, 22. Even by its own terms, however, that argument is incorrect.

To begin with, at the risk of belaboring the point, neither court below has ever given any indication that the policy of student assignment affected the level of education in St. Louis as a whole or, indeed, in any particular

schools. Moreover, were they to try and do so, they would be met by two irrefutable facts of record. The first is that the supposedly inferior St. Louis schools have a AAA rating even though many other school districts in Missouri do not. The second is that St. Louis schools had a AAA rating in 1954, when the policy of segregation was declared unlawful, and have continued to have a AAA rating for most of the thirty years since. It would thus appear incredible to claim that a temporary loss of AAA status in 1983 was causally related to the *de jure* school policy relied on so heavily by respondents.

The building program rests, if possible, on even less stable footing. Even if one indulges the assumption that *de jure* segregation had some effect on the buildings themselves,[6] the order here is tailored, not to the effects of any such violation, but solely to the appetite of the City Board and City voters.[7] To make matters worse, as Judge Gibson pointed out, Pet. App. 84a, the patent cause of any disrepair in the City schools is the failure of City voters to approve bond issues for renovation. The purpose of this program, thus, is not to redress discrimination but to get the State to pay for what the City voters would not.

3. Respondents correctly point out that this Court has declined to review earlier orders in this case. But even aside from the fact that such denials are not deemed to be decisions on the merits, see *United States v. Carver*,

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[6] The assumption, in fact, is untenable. While respondents seek to convey the impression that schools with the highest percentage of black students have the poorest buildings, the reverse is true. See Pet. App. 193a-194a.

[7] The district court ordered that "[*a*]*ny amount* raised for capital expenditures by the City Board through a voter-approved bond issue at any time during 1983-1984 *shall be matched* equally by the State of Missouri." Pet. App. 97a (emphasis added).

260 U.S. 482, 490 (1923), those actions have little to do with the case in its present posture.[8]

First, it is obvious that we are dealing with a very different order. Not only are the financial consequences larger by a factor of ten or more, the order now involves a greatly expanded busing plan, for the express purpose of changing the racial mix in the St. Louis metropolitan area, as well as wholly new provisions dealing with quality education and capital improvements. At the same time, the order was reached by a new and extraordinary method, having been drafted by respondents as the settlement of a recently-filed interdistrict lawsuit, reviewed only at a Rule 23 hearing to determine its fairness to the plaintiffs, and then imposed without findings by a district judge who expressly renounced his power to modify it. This process alone calls for heightened scrutiny.

This scrutiny is made all the more important by the review given by the court of appeals. The court, sitting *en banc*, not only declined to require proper findings, as we think essential under *Dayton* I, but also, for the first time, brought to light previously hidden standards for improving racial balance, AAA schools, and the like. As the dissenting judges pointed out, Pet. App. 73a-94a, this transfer of State funds to a single school district was carried out with only the most cursory attention to the procedural and substantive standards set forth by this Court. The issues are thus both more complex and far sharper at this point.

The issues are also of considerable significance. It is by now well-established, of course, that the Constitution does not require governments to eradicate all differences between their citizens. See, e.g., *Harris v. McRae*, 448

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[8] We note that respondents opposed an earlier petition on the ground that it was "premature." Brief in Opposition of Respondents Board of Education of the City of St. Louis, et al., No. 80-2152, at 10-12.

U.S. 297 (1980) (no obligation to subsidize right to abortion). But the task of identifying conditions that may be judicially redressed is an exceptionally delicate one. This Court has provided some limits in this area by holding that plaintiffs must prove purposeful state action. See *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Yet, unless the courts also are required to identify a causal link between state action and the condition to be redressed, they will remain free, as in this case, to compel remedies for conditions that not only have no origin in purposeful state action but have no origin in state action at all. That result is an inexcusable extension of judicial power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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